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The Rehnquist Court's First Term — Is *Miranda* Down For The Count?

by Joseph M. Giannullo

A. Introduction

This article will examine how the Rehnquist Court in its first term has treated the *Miranda* decision. Based on the first four *Miranda* cases to come before it, it is apparent that the Rehnquist Court will continue to construe *Miranda* narrowly. The Rehnquist Court is thus continuing the work that was started by the Burger Court, which chipped away at various aspects of the Miranda decision over a fifteen year period. This article will begin with an analysis of the pre-*Miranda* "voluntariness" standard regarding confessions given by suspects. Then *Miranda's* concrete guidelines will be analyzed. Next, the Burger Court's efforts in narrowing *Miranda* will be explored. Lastly, this article will analyze the Rehnquist Court's treatment of *Miranda* during its first term.

B. The Pre-Miranda "Voluntariness" Standard

The Supreme Court's decision in *Miranda v. Arizona* changed the way the police interrogation process was carried out in this country. The use of improper police interrogation techniques to elicit confessions from suspects had been a special concern since the early 1930's, when the Wickersham Commission report on police abuses was released.[2] In the mid-thirties the Supreme Court specifically addressed the problem in *Brown v. Mississippi*[3], which involved a state homicide conviction based upon a confession obtained through physical punishment. Although there was no clear ground for reversing the conviction,[4] the Court found the whole interrogation procedure "revolting to the sense of justice,"[5] and therefore violative of the fourteenth amendment's due process clause.

In the thirty years following *Brown*, the Court decided more than thirty cases concerning allegedly coerced confessions.[6] During this period the "voluntariness" doctrine regarding coerced confessions emerged. At first the Court's primary concern was with confessions coerced by physical brutality.[7] The Court soon brought psychological coercion within the "voluntariness" doctrine as well.[8] Although the due process rationale initially was directed at the potential unreliability of the evidence,[9] the doctrine gradually expanded, focusing also on the fairness of the police interrogation practices[10] and the individual's state of mind in deciding whether or not to confess.[11]

Gradually, the Court came to rely less upon whether the confession was reliable to decide its "voluntariness" and more upon whether, given the totality of the circumstances, the confession could be said to be voluntary.[12] In a series of decisions, the Court listed some factors that should be weighted in considering the totality of circumstances upon which "voluntariness" was to be predicated.[13] Among these factors were: the age of the accused,[14] the accused's education and intellegience,[15] the conditions under which the interrogation took place,[16] the physical and mental condition of the accused,[17] the inducements, methods, and strategies used to persuade the accused to confess,[18] and the extent to which the police used deceit and trickery while questioning the suspect.[19] Thus, despite the apparent simplicity of the "voluntariness" concept on its face, as applied it proved to be highly elusive, requiring a careful balancing of complex variables concerning police behavior and the suspect's subjective attributes.[20]

Consistent with its general and flexible approach in defining "voluntariness," the Court's later decisions did not precisely articulate what factors rendered a confession involuntary and therefore violative of a suspect's due process rights.[21] The Court's opinions condemned "overbearing the will" of the accused as determined by the "totality of the circumstances."[22] The Court reasoned that "overbearing the will" was fundamentally unfair and that "ours is an accusatorial and not an inquisitorial system."[23]

Given the Court's inability to articulate a clear definition of "voluntariness," state courts persistently took advantage of the loose concept and validated confessions of doubtful constitutionality, resulting in an increased burden on the Supreme Court in reviewing these cases.[24] This increased bur-

den caused the Court to seek to create "some automatic device by which the potential evils of incommunicado interrogation could be controlled."[25] Also, legal commentators were highly critical of the "voluntariness" standard.[26] The first criticism was that the standard left police without guidelines on how to conduct interrogations of suspects.[27] As stated by Professor Stephen J. Schulhofer, "because of its vagueness and its insistence on assessing the 'totality of circumstances', the voluntariness standard gave no guidance to police officers seeking to ascertain what questioning tactics they could use."[28] Police had to be watchful as to when the ad hoc point at which a suspect's will was overborne was reached.[29] In other words, the standard's ambiguity did not inform police with specificity regarding available alternatives to be used in conducting custodial interrogation.[30]

The ambiguity of the "voluntariness" standard led to a second difficulty, the difficulty of judicial review.[31] Commentators asserted that if the standard failed to give guidelines to police, then it could not afford the courts the necessary guidelines to decide whether or not a confession was voluntary.[32] Consequently, this lack of guidance led to an ad hoc due process approach. Because judges "were virtually invited to give weight to their subjective preferences when performing the elusive task of balancing" and weighing the totality of the circumstances,[33] the disposition of cases greatly varied.

Another substantial defect of the "voluntariness" standard asserted by commentators was that its application was "fatally dependent upon resolution of the swearing contest."[34] Since no one other than the accused and the police is present during custodial interrogation, judges had to decide on the relative credibility of the testimony of each, with the police invariably receiving more credibility.[35]

C. Miranda's Concrete Guidelines

The Court's first major step in seeking some clear-cut guidelines by which to control the evils of incommunicado interrogation rested on the sixth amendment guarantee of the right to counsel in criminal cases. Prior to 1964, the refusal of police to permit the subject of interrogation to consult with counsel was regarded as only one of the factors relevant to the "voluntariness" of the confession.[36] In *Massiah v. United States*,[37] however, the Court held that a post-indictment interrogation was a "critical stage" of the prosecution to which the right to counsel attaches. The sixth amendment, therefore, required the exclusion of incriminating statements, made by the accused after he had been indicted and in the absence of counsel.[38] *Massiah*, however, was limited to post-indictment confessions, and unfortunately this did not affect the majority of improper police interrogations.

A month later, in *Escobedo v. Illinois*,[39] the Court extended its sixth amendment approach to pre-indictment interrogation. Yet, the precise reach of this decision was left uncertain due to the Court's sweeping language and its express limitation of the holding to the specific facts in *Escobedo*. This ambiguity generated considerable debate and confusion.[40]

Two years after *Escobedo*, the Court shifted its emphasis from the sixth amendment to the fifth, and granted certiorari in *Miranda* "to explore some facets of the problems...of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete consitutional guidelines for law enforcement agencies and courts to follow."[41]

"Miranda established concrete guidelines for custodial interrogations..."

Miranda was a series of four companion cases involving the same situation: In each, the defendant had been arrested and not informed of his constitutional rights. The accused in each case was then taken to the police station where confessions were elicited and later used to convict the defendant at trial.[42] In each case the Court held that the improperly elicited confession violated each defendant's fifth amendment privilege against self-incrimination. The first issue confronting the Court concerned the applicability of the privilege in the extrajudicial context of police interrogation. Although the Court had so applied the privilege against self-incrimination seventy years earlier in *Bram v. United States*,[43] that decision had been vigorously criticized as founded upon a confusion between the constitutional privilege and the common law rule governing coerced confessions.[44] The *Miranda* Court reaffirmed *Bram*.[45]

The Court next turned its attention to the nature of custodial interrogation. At the outset, the Court noted that, in part because of the traditionally incommunicado setting of police interrogation, the use of physical brutality to secure confessions could not effectively be eradicated without additional limitations on the police interrogation process.[46] The Court then observed that the modern practice of in-custody interrogation is primarily psychological rather than physical. After describing various psychological tactics advocated in police manuals as effective means of obtaining confessions, the Court stressed that it had long recognized that coercion can and does exist even in the absence of physical brutality.[47] Thus, the Court maintained that "even without employing brutality, the 'third degree' or the specific strategems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[48] Although conceding that the confessions of the four defendants involved in *Miranda* might not "have been involuntary in traditional terms," the Court concluded that to offset the coercive pressures inherent in custodial interrogation, safeguards must be employed to assure that the suspects has a "full opportunity to exercise the privilege against self-incrimination."[49]

Accordingly, *Miranda* established concrete guidelines for custodial interrogations in an attempt to guarantee suspects their fifth amendment right against self-incrimination. Recognizing that the Constitution does not require any particular solution to the problem, the Court declared that unless "other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it" are employed,[50] prior to any questioning, the person must be advised of his *Miranda* rights which include: the right to remain silent, any statement made may be used as evidence against him, and the right to counsel, either retained or appointed. Finally, the Court stated that the defendant may waive these rights provided that the waiver is made voluntarily, knowingly, and intelligently, however, if the defendant indicates in any manner at any stage of the process that he wishes to consult with an attorney or not to be questioned, the interrogation must cease.[51]

It is evident from the language of the *Miranda* opinion that the Court believed that the new procedures were protected by the Constitution.[52] The *Miranda* Court stessed:

We encouraged Congress and the

> states continue their laudable search for increasingly effective ways of protecting the rights of the individual while prompting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in appraising accused persons of their right of silence and in assuring a continuing opportunity to exercise it, the following safeguards must be observed.[53]

A plain reading of this passage indicates that the procedures mandated by the Court in *Miranda* are constitutionally protected and shall be the law unless and until Congress or the states devise procedures that are at least as effective as those set forth in *Miranda*.[54]

D. The Burger Court Slices into Miranda

The *Miranda* decision was criticized by many after it was handed down. Senator Sam J. Ervin, Jr. lambasted the *Miranda* holding, claiming that it left the police powerless to conduct in-custody interrogation of suspects.[55] Judge Henry Friendly of the Second Circuit expressed concern that the Court's *Miranda* holding would unduly hamper proper police interrogation practices.[56] The FBI was concerned that *Miranda* would hinder its efforts to obtain confessions from suspects.[57] Nevertheless, the *Miranda* decision was a legacy of the Warren Court that was inherited by the Burger Court.

In the early seventies it appeared that the Court was paving the way to overrule *Miranda*. The Burger Court's first confrontation with *Miranda, Harris v. New York*,[58] presented the question whether statements elicited from a defendant without full compliance with the *Miranda* safeguards could be used to impeach the defendant when he testified at trial. The Court, in an opinion by Chief Justice Burger, answered this question in the affirmative. Although *Miranda* had indicated that statements obtained in violation of its dictates could not be used to impeach the defendant,[59] the Chief Justice's *Harris* opinion maintained that *Miranda's* discussion of the impeachment issue "was not at all necessary to the Court's holding and cannot be regarded as controlling."[60] The *Harris* decision, in essence, gave *Miranda* a technical reading, thus enabling Burger's opinion to label many critical aspects of the *Miranda* decision mere dictum and therefore not "controlling."

Then, in *Michigan v. Tucker*,[61] the Court, in an opinion by then associate Justice Rehnquist, held that the prosecution could use evidence which was the "fruit" of an unwarned statement. In the case the defendant was arrested for rape and assault and taken to the police station for questioning. The defendant was not advised of his right to appointed counsel prior to interrogation and proceeded to give incriminating information to the police. At trial, the defendant objected to the prosecution's use of the incriminating statements on the ground that the police obtained the statements only through an unlawful interrogation. The state courts affirmed the defendant's conviction,[62] but a federal district court granted habeas corpus relief that was affirmed by the Sixth Circuit Court of Appeals.[63] The Supreme Court reversed.

Writing for the majority, Justice Rehnquist's opinion reasoned that the procedural safeguards set out in *Miranda* "were not themselves rights protected by the Constitution."[64] Justice Rehnquist then concluded that there had been no violation of Tucker's rights under the fifth amendment because his statement "could harldy be termed involuntary as that term has been defined in the decisions of this Court."[65]

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The majority's conclusion in *Tucker*, that there is a violation of the self-incrimination clause only if a confession is involuntary under traditional standards, was an outright rejection of the core premises of *Miranda*. As Justice Rehnquist added, the Court in *Miranda* thought that the privilege against self-incrimination offered a "more comprehensive and less subjective protection"[66] than the due process clause, which had been the basis of the traditional "voluntariness" test. Thus, recognizing the inherently compelling nature of in-custody interrogation,[67] the *Miranda* Court had held that in the absence of appropriate safeguards, an improperly elicited statement violated the accused's fifth amendment rights despite its voluntary character under traditional standards. Justice Rehnquist's analysis in *Tucker*- viewing the privilege solely in terms of the voluntariness test-simply rejected this aspect of *Miranda* . The conclusion that a violation of *Miranda* is not a violation of the right against self-incrimination is flatly inconsistent with the Court's declaration in *Miranda* that "the requirement of warnings and waiver or rights is a fundamental with respect to the fifth amendment privilege."[68]

Having concluded that the conduct of the police did not violate the defendant's rights in *Tucker* under the fifth amendment, Justice Rehnquist next turned to the question of whether the incriminating statements should have been excluded because they were fruits of a statement elicited in violation of the *Miranda* safeguards. In *Wong Sun v. United States*,[69] the Court held that the fruits of an unconstitutional search and seizure must be suppressed. Justice Rehnquist distinquished *Wong Sun*, in that the police conduct in *Tucker*, unlike in *Wong Sun*, did not violate the defendant's constitutional rights.[70] The implications of the earlier analysis now became apparent. Although *Miranda* was not overruled by Tucker, it thereafter stood below even the disfavored fourth amendment exclusionary rule in constitutional importance.

The *Tucker* decision proved devastating for *Miranda*. The Court deprived *Miranda* of a constitutional basis and further failed to explain what other basis there might be for *Miranda*. Moreover, even if *Tucker* did not entirely dismantle *Miranda*, it clearly severed it from the privilege against compelled self-incrimination. The decision in *Tucker* seemed to have laid the groundwork to overrule *Miranda*.[71]

In *Oregon v. Hass*,[72] the Court further defined its earlier *Harris* ruling. In *Hass*, the defendant was arrested for theft and given his *Miranda* warnings. Nevertheless, the defendant admitted stealing two bicycles, but was uncertain as to the bicycles' whereabouts. The defendant and a police officer then departed in a patrol car to look for the bicycles. On the way, the defendant changed his mind and asked to telephone his attorney. The officer told the defendant he could contact his attorney when they returned to the station but, instead of returning immediately, the officer continued the investigation.[73] The officer's conduct at this point amounted to a "bad faith" violation of *Miranda*, as compared to the police conduct in *Harris*, which was not taken in "bad faith." The defendant eventually located the stolen bicycles and told the officer from which house they had been stolen. The defendant was convicted at trial. The Oregon appellate courts overturned the conviction,

holding that the evidence obtained by the police after the defendant had requested an attorney was inadmissible even for purposed of impeachment.[74] The Supreme Court reversed.

The result of *Hass* was that even when the police act in bad faith in violating a defendant's *Miranda* rights, any evidence obtained subsequent to the violation can be used to impeach a defendant who testifies at trial. In practical effect, *Hass* constituted an open invitation to police to disregard a suspect's right to the assistance of counsel. Justice Brennan, in his *Hass* dissent, recognized this problem and stated: "Thus, after today's decision, if an individual states that he wants an attorney, police interrogation will doubtless now be vigorously pressed to obtain statements before the attorney arrives."[75]

E. The Rehnquist Court's First Term and Miranda

By the time William Rehnquist was appointed Chief Justice of the Supreme Court in the summer of 1986, *Miranda* had already been substantially eroded away.[76] Moreover, the United States Attorney General, Edwin Meese III, had repeatedly called for *Miranda's* reversal since assuming his position in 1985.[77] Given this atmosphere, one could not expect the Rehnquist Court in its first term to look kindly toward *Miranda.*

The Rehnquist Court first encountered *Miranda* in *Colorado v. Connelly.*[78] In that case, the accused approached a Denver police officer and stated that he had murdered someone and wanted to talk about it. The accused was given his *Miranda* rights by the officer, but acknowledged that he understood them and nevertheless wanted to talk about the murder. Shortly thereafter, a detective arrived and again advised the accused of his *Miranda* rights. Later at police headquarters the accused told his story to the police and pinpointed the exact location of the murder. The accused was held overnight. The next day, during an interview, the accused appeared disoriented and was sent to a state hospital for evaluation. It was discovered that the accused believed he was following the "voice of God" in confessing to the murder. The trial court, relying on psychiatric testimony to the effect that the accused suffered from a psychosis that interfered with his ability to make free and rational choices, suppressed his initial statements and custodial confession because they were "involuntary." The Colorado Supreme Court affirmed, holding that respondent's mental condition precluded him from making a valid waiver of his *Miranda* rights.[79] The Supreme Court reversed.

The Court's opinion by Chief Justice Rehnquist held that coercive police activity is a necessary predicate to a finding that a confession is not "voluntary" within the meaning of the due process clause of the fourteenth amendment.[80] Because the police did nothing to "coerce" the accused into talking, the taking of the statements and their admission into evidence constituted no due process clause violation. The Court conceded that the mental condition of criminal defendants has become a more significant factor in the "voluntariness" calculus, *Spano v. New York,*[81] but concluded that this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should even dispose of the inquiry into constitutional "voluntariness."[82]

"The Rehnquist Court first encountered Miranda in Colorado v. Connelly."

The Rehnquist opinion then focused on the issue of whether the accused had waived his *Miranda* rights. The Colorado Supreme Court held that no valid waiver occurred because the accused's mental condition precluded him from making a free choice regarding the waiver. The Supreme Court disagreed. The Court held that "voluntariness" for *Miranda* waiver purposes merely requires that there be an absence of police coercion before and during the time a suspect gives a statement.[83] To support his proposition the Court relied on its 1985 decision in *Oregon v. Elstad,*[84] which suggested that any confession, whether or not it is preceded by *Miranda* advisements, is voluntary under the fifth amendment unless the police do some overt, coercive act.

Justices Marshall and Brennan dissented in *Connelly.* They criticized the Court's failure to recognize all forms of involuntariness or coercion as antithetical to due process.[85] Moreover, the dissent relied on *Culombe v. Connecticut*[86] which defined involuntary confessions as those obtained compulsion, of whatever nature or however infused.[87] It was also pointed out that in every prior case the Supreme Court had made clear that ensuring a confession was a product of a free will was an independent concern.[88] Thus, the dissent refuted the majority's contention that police overreaching was the sole concern of the Court's prior "free will" confession cases.

The Rehnquist Court next considered the *Miranda* issue in *Connecticut v. Barrett.*[89] In that case William Barrett was arrested for sexual assault. Barrett received the *Miranda* advisements three times. Each time he told he would not sign any written statement without counsel present, but he had no problem with "talking about the incident."[90] He then confessed to the assault. When the police tape recorder repeatedly failed to record the statement, one officer reduced his recollection of the statement to writing.[91]

The trial court refused to suppress the confession, finding that the accused had fully understood the *Miranda* advisements and had voluntarily waived them. The Connecticut Supreme Court reversed the conviction. The court held that the accused's expressed desire for counsel before making a written statement constitued an invocation of the right to counsel for all purposes. The Connecticut high court held that the accused had not waived his rights by initiating further discussion with the police, and therefore the incriminating statement was improperly admitted into evidence.[92]

The Supreme Court, in an opinion by Chief Justice Rehnquist, reversed the Connecticut Supreme Court. The Chief Justice first analyzed the Connecticut Supreme Court's rationale in reversing the trial court. The Connecticut Supreme Court decided that Barrett's express desire for counsel before making a written statement served as an invocation of the right for all purposes.[93] This invocation, the court believed, brought the case within what it called the "bright-line" rule for establishing a waiver of this right.[94] The "bright-line" rule requires a finding that the suspect (a) initiate further discussions with the police, and (b) knowingly and intelligently waive the right previously invoked.[95] Because Barrett had not initiated further discussions with the police, Connecticut's highest court found his statement improperly admitted into evidence.

The majority's opinion stressed that Barrett's willingness to talk about the crime that he allegedly committed constituted a voluntary waiver of his *Miranda* rights. The Court explained that the fundamental purpose of *Miranda* advisements is to assure that an individual's right to choose

between speech and silence remains unfettered throughout the interrogation process.[96] Barrett chose to speak rather than remain silent. Hence, according to the majority, his fifth amendment right against self incrimination was not violated.[97] Moreover, the Court again made clear, as it had done in the past,[98] that the *Miranda* advisements are mere prophylactic rules rather than rules of constitutional interpretation.[99]

Justice Brennan concurred separately in *Barrett.* Brennan stressed Barrett's affirmative waiver of *Miranda* under the circumstances. Justice Brennan noted that Barrett orally expressed a willingness to talk with the police and signed a form indicating that he understood his rights.[100] Barrett's actions thus enabled the state to meet its heavy burden of demonstrating a *Miranda* waiver.[101]

Justice Marshall filed a dissenting opinion in which Justice Stevens joined. The basis of the opinion was that Barrett's writ of certiorari was improvidently granted. Justice Marshall categorized the case as one in which a state supreme court arguably granted more protection to a citizen accused of a crime than the federal Constitution required.[102] According to Marshall, this was not a sufficient basis for the Court to grant certiorari, absent a conflict among the state or federal courts regarding the question presented.[103] The dissenting opinion did not discuss the issue of the sufficiency of Barrett's waiver of counsel.

The Court decided *Colorado v. Spring*[104] on the same day that *Barrett* was decided. The *Spring* case also dealt with the validity of a suspects waiver of *Miranda* rights. In that case, the respondent Spring was arrested for his possible involvement in the interstate transportation of stolen firearms. Respondent was advised of his *Miranda* rights. He signed a statement saying he understood and waived his rights, and was willing to answer questions during interrogation. Spring was questioned about the firearms transactions that led to his arrest and was also asked whether he had ever shot anyone, to which he answered that he had "shot another guy once."[105] About a month later Spring was given new *Miranda* advisements, but again signed a statement admitting that he understood his rights and was willing to waive them. He then confessed that he shot and killed a man in Colorado three months earlier and signed a statement to that effect.[106]

After being charged in a Colorado state court with first-degree murder, Spring moved to suppress both the March 30 and May 26 statements on the ground that his *Miranda* waiver was invalid. The trial court held that the questioners' failure to inform Spring before the March 30 interview that they would question him about the Colorado murder did not affect the waiver and therefore, the March 30 statement should not be suppressed. However, while ruling that the March 30 statement was inadmissibile on other grounds, the court held that the May 26 statement was made freely, voluntarily, and intelligently and should not be suppressed. Consequently, it was admitted into evidence, resulting in Spring's conviction.[107] The Colorado Supreme Court held that Spring's confession should have been suppressed becaused it was the illegal "fruit" of the March 30 statement.[108]

The Supreme Court reversed the decision of the Colorado Supreme Court. Justice Powell, writing the majority opin

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ion, first observed that Spring's May 26 confession could not have been the "fruit of the poisonous tree" unless the previous March 30 statement was itself "poisonous."[109] The Court asserted that a suspect may waive his fifth amendment privilege provided the waiver is made voluntarily, knowingly, and intelligently.[110] Consequently, based on the fact that Spring indicated that he understood the enumerated rights and signed a form expressing his intention to waive them, the Court concluded that Spring had voluntarily waived his rights.[111]

The Court relied on its prior decision in *Moran v. Burbine*[112] to advance the proposition that the inquiry whether a waiver is coerced is a two-step process: first, the relinquishment of the right must have been the product of a free and deliberate uncoerced choice; and second, the waiver must have been made with a full awareness both of the nature of the right abandoned and the consequences of the decision to abandon it.[113] The Court applied this test to Spring's waiver and concluded that it was voluntary. First, the Court stated that Spring alleged no coercion due to physical violence or other deliberate means calculated to break his will.[114] Secondly, the Court held that the Constitution does not require that a suspect know and understand every possible consequence of a waiver of the fifth amendment privilege. To support this latter proposition, the majority relied on two of the Court's recent decisions, *Moran v. Burbine*[115] and *Oregon v. Elstad.*[116]

The majority then dismissed Spring's argument that the failure to inform him of the potential subject matter of interrogation constituted police trickery and deception condemned in *Miranda,* thus rendering his waiver of *Miranda* rights invalid. The majority stated that "this Court has never held that mere silence by law enforcement officials as to the subject matter of an interrogation is 'trickery' sufficient to invalidate a suspect's waiver of *Miranda* rights, and we expressly decline to so hold today."[117] The Court again relied on *Burbine* for support, nothing that "we have held that a valid waiver does not require that an individual be informed of all information 'useful' in making his decision...."[118]

Justices Marshall and Brennan dissented in *Spring.* The dissenters agreed with the majority's conclusion that a waiver of *Miranda's* protections during custodial interrogation must be examined in light of the "totality of the circumstances."[119] The dissenters then parted company with the majority and argued that a suspect's decision to waive *Miranda* could be influenced by his understanding of the scope and seriousness of the matters under investigation.[120]

The dissenters disagreed with the majority conclusion that a suspect's awareness of the subject matter of police questioning could only affect the wisdom, and not the validity, of a *Miranda* waiver. They stressed that wisdom and validity in the *Miranda* waiver context are overlapping concepts, as circumstances relevant to assessing the validity of a waiver may also be highly relevant to its wisdom in any given context.[121]

The fourth and most recent *Miranda* case to come before the Rehnquist Court was *Arizona v. Mauro.*[122] In *Mauro* the respondent was arrested for murder and subsequently given his *Miranda* advisements. He was then taken to the police station and again advised his *Miranda* rights. Mauro then told the officers that he did not wish to speak without having a lawyer present. Mauro's wife then asked, unk-

nown to Mauro, if she could speak to her husband. Her request was granted on the condition that a police officer remain in the room and record the conversation.[123] During the conversation, Mauro told his wife not to answer questions until a lawyer was present.

At trial, Mauro's defense was that he had been insane at the time of the crime. The prosecution then played the tape of the meeting between Mauro and his wife, arguing that it demonstrated Mauro was not insane the day of the murder. The trial court refusd to suppress the recording, dismissing Mauro's argument that it was a product of police interrogation in violation of *Miranda.*[124] The Arizona Supreme Court reversed. It held that because Mauro spoke to this wife in the presence of a police officer, he was under interrogation within the meaning of *Miranda.* The court said this interrogation was impermissible because Mauro previously had invoked his right to counsel before questioning began.

The Supreme Court reversed, with Justice Powell writing the majority opinion. The opinion began by clarifying what constitutes police interrogation for *Miranda* purposes. The Court cited *Rhode Island v. Innis*[125] for the proposition that *Miranda's* safeguards could be effectuated if they extended not only to express questioning, but also to its "functional equivalent."[126] Functional equivalent was defined as any action that the police should know would likely elicit an incriminating response from the suspect.

The Court then focused on the case before it. It noted that Mauro did not want to be questioned without a lawyer present. Thus, the narrow issue was whether the officers' actions were the "functional equivalent" of police interrogation. The Court held that under both *Miranda* and *Innis* Mauro was not interrogated.[127] The basis for the holding was that there was no evidence that the officers sent Mrs. Mauro in to see her husband for the purpose of eliciting incriminating statements. The Court acknowledged that there was the possibility that Mauro would incriminate himself while talking to his wife, but held that an interrogation does not take place under *Innis* when the police merely hope that a suspect will imcriminate himself.[128] It was pointed out that Mauro was not subject to compelling influences, psychological ploys, or direct questioning. As a result, the majority concluded that his volunteered statements could not properly have been considered the result of police interrogation.[129]

Justices Stevens, Brennan, and Marshall joined in a dissenting opinion. They noted that the Arizona Supreme Court had unanimously and unequivocally concluded that the police intended to interrogate Mauro. Relying on the record, the dissenters argued that the police employed a powerful psychological ploy by failing to do three things: 1) warn Mauro that his wife was coming to talk to him; 2) tell Mauro that a police officer would accompany his wife into the interrogation room; and 3) tell Mauro that the conversation would be recorded.[130] It was also pointed out, as the transcript from the conversation revealed, that Mauro would not have freely chosen to speak with his wife had he known she was coming to talk to him. The dissenters concluded that the police interrogated Mauro because they allowed the conversation with his wife to commence at a time when they knew it was reasonably likely to produce an incriminating statement.[131] Consequently, because Mauro had invoked his right to counsel, the subsequent interrogation violated his constitutional rights, according to the dissent.

"Miranda will continue to be construed as narrowly as possible by the Rehnquist Court"

F. Conclusion

A careful reading of the first four *Miranda* cases to come before the Supreme Court in its 1986/87 term suggests that *Miranda* will continue to be construed as narrowly as possible by the Rehnquist Court. The Court's decision in *Connelly* reaffirmed *Oregon v. Elstad*[132] regarding the voluntariness of a *Miranda* waiver. Both *Connelly* and *Elstad* stand for the proposition that a *Miranda* waiver will be considered voluntary unless the police use coercive tactics to induce it. In essence the holdings of *Elstad* and *Connelly* have resurrected the pre-*Miranda* voluntariness standard for determining whether a confession is voluntary. The pre-*Miranda* standard focused on the "totality of circumstances" surrounding a suspect's confession in order to determine whether it was given voluntarily.[133] A fair reading of *Elstad* and *Connelly* leads to the conclusion that when a suspect confesses to a crime, even without having been given *Miranda* advisements, the confession will be deemed voluntary and not a violation of the fifth amendment's self-incrimination clause unless the police used coercive tactics to elicit it.

Moreover, the Court's decision in *Connecticut v. Barrett*[134] viewed the *Miranda* advisements as mere prophylactic rules, despite express language in *Miranda* to the effect that they are themselves constitutional rights under the fifth amendment.[135] As a result, it is now possible for the police to violate a suspect's *Miranda* rights without at the same time violating his or her fifth amendment rights.

Further, the Court's decision in *Spring* focused on the factors necessary to effect a valid *Miranda* waiver. As in *Connelly,* the linchpin of the Court's analysis was the proposition that a *Miranda* waiver is voluntary unless the police use coercive tactics to induce it. Here again the Court's decision seems to advocate the use of the pre-*Miranda* "voluntariness" standard to determine whether a suspect's statement was given voluntarily.

The *Mauro* decision, while not dealing with the *Miranda* waiver issue, also contained language to the effect that a *Miranda* waiver is voluntary unless the police use coercive tactics to obtain it. The Court's decision cited *Spring* for the proposition that *Miranda's* safeguards are mere procedural devices effective to secure the privilege against self-incrimination and are not constitutional rights themselves.

A strong argument can be made that for all intents and purposes the *Miranda* decision has been overruled. The Court's recent *Miranda* opinions lend strong support to this argument. It is clear that the Rehnquist Court views *Miranda's* guidelines as mere procedural devices rather than constitutional rights. Consequently, it is possible to violate a person's *Miranda* rights without at the same time violating his or her fifth amendment rights. In effect, *Miranda* has been transformed from a rule of constitutional interpretation to a rule of evidence. Only police coercion that elicits an incriminating response will now violate one's *Miranda* rights. Thus, in the future it may be easier for prosecutors to convict a suspect using his or her own statement(s). The new standard suggest a suspect using his or her own statement(s). The new standard suggests that anything a suspect says can be used against him or her as long as the police did not use coercive tactics to elicit the statement, irrespective of whether other forms of mental coercion were present. The result of this standard

may be an increase in the use of incommunicado interrogation by the police in the future; with the issues on appeal focusing on the coerciveness of the police conduct rather than on the potential *Miranda* violations.

Notes

[1]384 U.S. 436 (1966).
[2]4 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).
[3]297 U.S. 278 (1936). Prior to *Brown*, the Court had only considered a few coerced confession cases arising out of federal prosecutions. These cases were decided on one of two bases; the constitutional privilege against compelled self-incrimination, *Bram v. United States*, 168 U.S. 532 (1897), or on common law principles, *Pierce v. United States*, 160 U.S. 355 (1896); *Hopt v. Utah*, 110 U.S. 574 (1884).
[4]*See* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 806-06 (1970). (In the 1930's the Fifth Amendment privilege against compelled self-incrimination had not yet been extended to the states).
[5]297 U.S. at 286.
[6]Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH L. REV 59, 102 n. 184 (1966); Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313 & n.1 (1964).
[7]*White v. Texas*, 310 U.S. 530 (1940).
[8]*Ashcraft v. Tennessee*, 322 U.S. 143, 148-53 (1944). (reversing a conviction because defendant held incommunicado for thirty-six hours and constantly interrogated); *Watts v. Indiana*, 338 U.S. 49 (1949).
[9]*Ward v. Texas*, 316 U.S. 547 (1942).
[10]*Rogers v. Richmond*, 365 U.S. 534 (1961); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).
[11]*Lynumn v. Illinois*, 372 U.S. 528 (1963); *Blackburn v. Alabama*, 361 U.S. 199 (1960).
[12]*See* M. EISENSTEIN, S. ALLEN & D. WINSTON, CRIMINAL DEFENSE TECHNIQUES sec. 3.03, at 3-9.
[13]*See generally* 19 AM. JUR. P.O.F. *Waiver Under the Miranda Decision* secs. 24-39 at 43-68 (1967). (providing a detailed explanation of factors both before and after *Miranda*).
[14]*Haley v. Ohio*, 332 U.S. 596, 599-600 (1948). (excluding a confession obtained from a fifteen-year-old boy after five hours of incommunicado interrogation).
[15]*Townsend v. Sain*, 372 U.S. 293, 303 (1963). (reversing a conviction obtained from a defendant who was a near mental defective).
[16]*Fay v. Noia*, 372 U.S. 391, 396 n.3 (1963). (granting habeas corpus relief to a defendant convicted by way of a coerced confession).
[17]*Blackburn v. Alabama*, 361 U.S. 199, 207 (1960). (holding the defendant's confession inadmissible because there was a strong possibility that he was insane at the time of the alleged confession).
[18]*Lynumn v. Illinois*, 372 U.S. 528, 534 (1963). (reversing a conviction where the defendant confessed only after the police told her that her children would be taken away if she did not confess).
[19]*Naynes v. Washington*, 373 U.S. 503, 513-14 (1963). (confession inadmissible because made while defendant was held incommunicado and where the police promised the suspect that he could call his wife if he cooperated with them).
[20]McCormick, EVIDENCE secs:149-50 (3d.ed.1984); Note, 79 HARV.L.REV. 935, 961-84 (1966).
[21]Schulhofer, *Confessions and the Court*, 79 MICH L.REV. 865, 867 (1981).
[22]*Id. See also Columbe v. Connecticut*, 367 U.S. 568, 602 (1961).
[23]*Rogers v. Richmond*, 365 U.S. 534, 541 (1961).
[24]*See* Amsterdam, note 4 *supra*, at 806-07.
[25]Schaefer, THE SUSPECT AND SOCIETY 10 (1967).
[26]*See* Grano, *Voluntariness, Free Will, and dthe Law of Confessions*, 65 VA.L. REV. 359-91; Schulhofer, *supra*, note 21, at 868-78 (due process test elusive and inherently unworkable).
[27]Schulhofer, *supra* note 21, at 869.
[28]*Id.*
[29]*Id.*
[30]*See supra* notes 26-29 and accompanying text.
[31]Schulhofer, *supra*, note 21 at 869-70.
[32]*Id.*
[33]*Id.* at 870. *See New York v. Quarles*, 104 S.Ct. 2626 (1984).
[34]Schulhofer, *supra* note 21, at 870.
[35]*Id.* at 870-71.
[36]*Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. Lagay*, 357 U.S. 504 (1958).
[37]377 U.S. 201 (1964).
[38]Within a year the Court made clear that this rule was equally binding on the states. *McLeod v. Ohio*, 381 U.S. 356 (1965). The sixth amendment had been held applicable to the states a year before *Massiah. Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).
[39]378 U.S. 478 (1964).
[40]Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN L. REV.47 (1964); Comment, *The Curious Confusion Surrounding Escobedo v. Illinois*, 32 U.CHI. L. REV. 560 (1965).
[41]*Miranda v. Arizona*, 384 U.S. at 441-42. The self-incrimination clause had been held applicable to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964).
[42]*Id.* at 436.
[43]168 U.S. 532 (1897).
[44]*See* McCormick, note 20 *supra*, at sec. 125.
[45]384 U.S. at 462.
[46]*Id.* at 445-47.
[47]*Id.* at 448-55.
[48]*Id.* at 455.
[49]*Id.* at 457, 467.
[50]*Id.* at 467.
[51]*Id.* at 444-45.
[52]*Id.* at 467.
[53]*Id.*
[54]*Id.*
[55]Sen. Sam J. Ervin, Jr., *Miranda v. Arizona: A Decision Based on Excessive and Visionary Solicitude for the Accused.* 5 AMERICAN CRIMINAL LAW QUARTERLY 125 (1966).
[56]Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U.CINC.L.REV. 671 (1968).
[57]H. Lynn Edwards, *The Effects of "Miranda" on the Work of the Federal Bureau of Investigation*, 5 AMERICAN CRIMINAL LAW QUARTERLY 159 (1966).
[58]401 U.S. 222 (1971)
[59]384 U.S. at 477.
[60]401 U.S. at 224.
[61]417 U.S. 433 (1974).
[62]19 Mich.App. 320 (1969), *aff'd* 385 Mich.594 (1971).
[63]480 F.2d 927 (6th Cir.1973).
[64]417 U.S. at 444.
[65]*Id.* at 444-45.
[66]*Id.* at 442-43.
[67]384 U.S. at 469.
[68]*Id.* at 476.
[69]371 U.S. 471 (1963).
[70]417 U.S. at 445-46.
[71]One court has suggested that *Tucker* did in fact overrule *Miranda* and reinstate the traditional voluntariness test. *See United States v. Crocker*, 510
[72]420 U.S. 714 (1975).
[73]*Id.* at 715-16.
[74]13 Ore.App.368, *aff'd* 267 Ore. 489 (1973).
[75]420 U.S. at 725 (Brennan, J.dissenting).
[76]*See supra* notes 58-75 and accompanying text.
[77]*See* STUDENT LAWYER, Vol.15, No.9, May 1987 at 25.
[78]107 S.Ct. 515 (1986).
[79]*Id.* at 517.
[80]*Id.* at 522.
[81]360 U.S. 315 (1959).
[82]107 S.Ct. at 520.
[83]*Id.* at 523.
[84]470 U.S. 298 (1985).
[85]107 S.Ct. at 526.
[86]367 U.S. 568 (1961).
[87]107 S.Ct. at 527.
[88]*Id.* at 527.
[89]107 S.Ct. 828 (1987).
[90]*Id.* at 829.
[91]*Id.*
[92]*Id.*
[93]*Id.* at 831.
[94]*Id.*
[95]*Smith v. Illinois*, 469 U.S. 91 (1984) *(per curiam)*
[96]*Miranda v. Arizona*, 384 U.S. at 476.
[97]107 S.Ct. at 833.
[98]*See Moran v. Burbine*, 106 S.Ct. 1135 (1986).
[99]107 S.Ct. at 832.
[100]*Id.* at 834.
[101]*Id.*
[102]*Id.* at 836.
[103]*Id.*
[104]107 S.Ct. 851 (1987).
[105]*Id.* at 854.
[106]*Id.*
[107]*Id.*
[108]*Id.* at 855.
[109]*Id.* at 856.
[110]384 U.S. at 444.
[111]*Id.*
[112]106 S.Ct. 1135 (1986).
[113]107 S.Ct. at 857.
[114]*Id.*
[115]106 S.Ct. 1135 (1986).
[116]470 U.S. 298 (1985).
[117]107 S.Ct. at 858.
[118]*Id.* at 859.
[119]*Id.*
[120]*Id.* at 860.
[121]*Id.*
[122]No. 85-2121, 55 U.S.L.W. 4601 (1987).
[123]*Id.* at 4602.
[124]*Id.*
[125]446 U.S. 291 (1980).
[126]*Id.* at 301.
[127]55 U.S.L.W. at 4603.
[128]*Id.* at 4604.
[129]*Id.*
[130]*Id.*
[131]*Id.* at 4605.
[132]470 U.S. 298 (1985).
[133]*See supra* notes 12-23 and accompanying text.
[134]107 S.Ct. 828 (1987).
[135]*See supra* notes 52-54 and accompanying text.

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